IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 44

WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 821

WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM S. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLMEIT, FRITZ STREUER,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

POINT I

THIS COURT SHOULD REVIEW THE DECISION BY THE CIRCUIT COURT OF APPEALS BELOW WHICH IS IN CONFLICT WITH THE DECISIONS BY THIS COURT AND BY OTHER CIRCUIT COURTS OF APPEALS.

In the recent case of United States v. Mitchell, (Nos. 514-515, decided on April 24, 1944), this Court stated:

"The McNabb decision was an exercise of our duty to formulate policy appropriate for criminal trials in the federal courts. We adhere to that decision and to the views on which it was based."

The Circuit Court of Appeals below, in seeking to substitute a standard of "convenient" arraignment for the standard of "immediate" arraignment prescribed by Congress, has refused to follow the decision by this Court in the McNabb case. In so refusing, the Circuit Court of Appeals quite frankly conceded the possibility that "we are wrong in our interpretation of the McNabb decision" (p. 1004).

The decision by the Circuit Court of Appeals below, moreover, although in accord with the case of United States v. Grote, 140 F. (2d) 413 (C.C.A. 2nd, 1944), which had been decided by the same court several weeks earlier, was directly contrary to the following cases by the same and other circuit courts of appeals: Gros v. United States, 136 F. (2d) 878 (C.C.A. 9th, 1943); United States v. Haupt, 136 F. (2d) 661 (C.C.A. 7th, 1943); United States v. Hoffman, 137 F. (2d) 416 (C.C.A. 2nd, 1943) and Runnels v. United States, 138 F. (2d) 346 (C.C.A. 9th, 1943). As this Court significantly observed in the Mitchell case, supra, the Government has left unchallenged the applications of the McNabb doctrine by circuit courts of appeals in the Haupt case, supra, the Gros case, supra, and the Runnels case, supra.

The Circuit Court of Appeals below conceded that its decision was contrary to the Haupt case (p. 1003).

POINT II

THE GOVERNMENT'S ATTEMPT TO ENLARGE THE RECORD HEREIN SHOULD BE TREATED AS A MOTION TO THAT EFFECT, AND AS SUCH, SHOULD BE DENIED.

In the Government's memorandum in opposition to the petitions for certiorari in this case, there will be found a sharp contrast between the profusion of record citations on pp. 4-12 thereof where the facts generally are discussed and the paucity of record citations on pp. 26-31 thereof where the facts relative to the obtaining of incriminating statements from the defendants are discussed. The Government seeks to supplement the record, which was certified to this Court in accordance with Rule 38, subdivision 1, of the Rules of this Court, by submitting in the form of photostats attached to the memorandum (see footnotes 27, 28, 29, 30 of the Government's memorandum), some seven documents which were before neither the trial court nor the Circuit Court of Appeals below.

We submit that this practice is highly irregular, is most unfair to the petitioners and should not be tolerated by this Court. A motion to enlarge the record in a case in-

volving a similar question of interpretation under the McNabb doctrine was denied in United States v. Mitchell on February 28, 1944 (CCH, Supreme Court Service, Dockets Volume, p. 4563; 12 U.S.L.W. 3284).

The photostats apparently attached to the memorandum submitted to this Court were not attached to the memorandum served upon counsel for the petitioners. The essential unfairness of attempting to enlarge the record in a case of this character by the device resorted to by the Government may be illustrated by the very first photostat mentioned in the Government's memorandum (See footnote 27 thereof). Referring to "a complaint filed in the District Court of the United States for the Southern District of New York, with the offense of wilful failure to keep his draft board advised of the address at which mail would reach him", the footnote reads:

> "See the photostatic copy, attached hereto, of the complaint against Kunze on this charge. There is a notation thereon of the fixing of bail and of the adjournment of the hearing to July 13, 1942 which would seem to indicate that Kunze was brought before the United States District Judge on the same day (July 6) on which the complaint was issued; and this was the same day on which he had made the statement admitted in evidence."

Apparently referring to this same complaint, the Government stated in a footnote found on page 58 of its brief in the

Circuit Court of Appeals below that:

> "Inasmuch as appellants did not raise at the trial the possible applicability of the McNabb and Anderson cases, this record is incomplete as to appellant Kunze's arraignments. In order to enable this Court to evaluate the legal position now taken by appellants, it is necessary to supplement this record by allusion to the Selective Service complaint under which the appellant Kunze was arraigned on July 6, 1942, a document which constitutes part of the records of the office of the United States Commissioner for the Southern District of New York."

At no time have the petitioners or their counsel seen even a copy of the complaint referred to. We do not know that any arraignment whatever took place on July 6, 1942, as asserted. We do know that, contrary to the assertion made in the Government's brief in the Circuit Court of Appeals below, and set forth above, there is no record of any kind, character or description on file in "the office of the United States Commissioner for the Southern District of New York" showing an arraignment of the petitioner Kunze on July 6, 1942 or on any other day. Whether the statement found in footnote 27 of the Government's memorandum in this Court, and the photostat therein referred to, are any more accurate than the Government's footnote statement in its brief in the Circuit Court of Appeals below, we are not in a position to know, for we have not been supplied with copies of the papers with which the Government seeks to enlarge the record.

Even if the petitioner Kunze had been arraigned on July 6, 1942 on a complaint charging him with failure to keep his draft board advised of the address at which mail would reach him, such an arraignment would be wholly irrelevant to the issue of the timeliness of his arraignment on the charge upon which he was tried in the instant case, viz. conspiring to counsel others to evade, resist and refuse service in the land and naval forces of the United States. Since the incriminating statement was admitted against Kunze on the trial of the latter charge, only an arraignment on this charge would be material under the doctrine of the McNabb case. This Court precisely so ruled in the McNabb case itself upon an application for a rehearing when the Government attempted to show that the petitioners in that case had been arraigned shortly after arrest upon a charge other than the charge upon which they were later tried and convicted; such an arraignment in the McNabb case was held to be not material to the issue before the Court of immediate arraignment.

In considering the question involved in the McNabb case, the courts frequently have been confronted with records which do not show precisely when arraignment took place. Under such circumstances, where the Government has not sustained the burden of showing at the trial (not in the Court of last resort) the facts in respect to arraignment, the courts uni-

formly presume that arraignment followed arrest and procurement of the incriminating statement. McNabb v. United States, 318 U.S. 332, 334 (1943); Gros v. United States, 136 F. (2d) 878, 880 (1943); United States v. Hoffman, 137 F. (2d) 416, 421 (1943). We know of no case where the Government has been permitted on appeal to enlarge the record in respect to the facts of arraignment.

Accordingly, the documents with which the Government seeks to enlarge the record, aside from not being properly before this Court in the usual manner by which a record is certified and not being disclosed to counsel for the petitioners, are not material to the issue which this Court is called upon to determine under the McNabb case. We respectfully submit that the Government's attempt to enlarge the record should be treated as a motion to that effect, and as such, should be denied.

POINT III

PETITIONERS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS SHOULD BE GRANTED

The Government does not deny the facts set forth in the affidavit of Theodore Kiendl, verified March 23, 1944, which has been submitted in support of the petitioners' motion for leave to proceed in this Court in forma pauperis. The Government therefore concedes the destitute status of the petitioners, the privilege accorded them to proceed in forma pauperis in the District Court and in the Circuit Court of Appeals below and the consent by the Government to permit them to continue to proceed in forma pauperis in this Court.

In footnote 1 of the Government's memorandum, it is asserted that "According to the Department's records" certain of the petitioners have been denaturalized and therefore "it would appear" that these petitioners are not entitled to proceed in forma pauperis. Just what records are referred to and what the records show, we do not know. Since the Government has not chosen to set forth this information in the form of an affidavit in opposition to Mr. Kiendl's affidavit, we assume that no serious opposition is intended. Certainly there are no facts properly before this Court to dispute the facts set forth in Mr. Kiendl's affidavit in support of a motion by the petitioners for leave to proceed in forma pauperis, to which the Government has expressly consented.

CONCLUSION

A writ of certiorari should be issued by this Court as prayed for in the petition.

Dated: New York City, May 10, 1944.

Respectfully submitted,

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